MERLIN W. TRIPP, SR.

IBLA 75-334 Decided June 27, 1975

Appeal from the rejection by the California State Office, Bureau of Land Management (BLM), of appellant's application (CA 2411) for an Indian allotment on national forest lands.

Affirmed.

1. Indian Allotments on Public Domain: Classification -- Indian Allotments on Public Domain: Lands Subject to

In applying the statutory criteria to an Indian allotment application for land in a national forest under the Forest Allotment Act of June 25, 1910, 25 U.S.C. § 337 (1970), the Secretary of the Interior is bound by the determination of the Secretary of Agriculture that the land is more valuable for the timber found thereon than for agricultural or grazing purposes. An application must be rejected where there is such a determination and there is neither confusion regarding the basis of the report nor error apparent on the face of the report.

APPEARANCES: Abby Abinante, Esq., California Indian Legal Services, Eureka, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Appellant filed an application for Indian allotment for certain land within the Klamath National Forest pursuant to Section 4 of the General Allotment Act of February 8, 1887, 25 U.S.C. § 334 (1970), and Section 31 of the Forest Allotment Act of June 25, 1910, 25 U.S.C.

§ 337 (1970). The report from the Forest Service, United States Department of Agriculture, with respect to said application stated, in part, that:

> * * * Although the approximately 20 acres applied for contains openings in roads and in clearings, about 75 percent of the site is timber covered in Douglas fir, oak and madrone. Both because of the commercial value of the timber as sawlogs and because of the amenities of the timber, including aesthetic and watershed values, the applied-for land as a single unit is considered to be more valuable for the timber found thereon than it is for agriculture or grazing purposes. Therefore, pursuant to Section 31 of the Act of June 25, 1910, which provides that an allotment may not be granted for land which is more valuable for the timber found thereon than it is for agriculture or grazing purposes, the land is considered to be not suitable for allotment.

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On the basis of this report, the application was rejected by the BLM on the primary ground that the Department of Agriculture reported the land was more valuable for timber than for agriculture or grazing. 1/

The essential arguments raised by the appellant's attorney relate to the question of the value of the land for timber, agriculture, or grazing purposes. First, it is alleged that the inclusion of both the commercial sale value of the timber and its value for watershed and aesthetic purposes involves an improper evaluation technique in that the fulfillment of one use necessitates the sacrifice of the other use (i.e., the sale and harvest of the timber would eliminate the watershed and aesthetic benefits derived from that timber). Second, appellant alleges that the evaluation of the usefulness of the land for agriculture or grazing should

1/ The decision gave an additional ground that appellant's occupancy of the land under a mining claim could not suffice to meet the occupancy requirements of the Act of June 5, 1910. Appellant has responded to that ground also in this appeal. However, in view of our disposition of this case on other issues decisive of appellant's right to an allotment, we find it unnecessary to consider the question of whether appellant qualified for an allotment in this regard. We note that the Forest Allotment Act is only applicable to nonmineral land. An assertion of right under a mining claim is inconsistent as it is an assertion that land is mineral in character.

take into account the Indian way of life involving the harvesting of natural food products from the land, such as acorns and pine nuts; the grazing value for wild animals which are hunted for food by Indians; and the "grazing" potential for chickens and hogs, which could be sustained mainly on the natural forage of the area.

The statutory basis for Indian allotments in national forest lands is found in Section 31 of the Forest Allotment Act of June 25, 1910, supra, which provides that:

> The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest * * *. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

[1] As the statute indicates, the determination of whether the lands applied for are more valuable for agricultural or grazing purposes than for timber is made by the Department of Agriculture, not the Department of the Interior. The Department of the Interior is bound by the finding of the Department of Agriculture in that regard and cannot approve an allotment application unless the Department of Agriculture reports that the land is more valuable for agricultural or grazing purposes than for timber. Everett E. Wilder, 15 IBLA 336, 339 (1974); Donald E. Miller (On Remand), 15 IBLA 95, 81 I.D. 111 (1974); Junior Walter Daugherty, 7 IBLA 291, 294 (1972). It is true that in those limited circumstances where the basis of a report of the Forest Service which is unfavorable to the applicant is unclear or where it appears from the face of the report that it may not be correct, this Department may request a clarification of the basis of the report from the Forest Service. Miller v. United States, Civil No. 70-2328 (N.D. Cal., 1973); Everett E. Wilder, supra, at 339; Donald E. Miller, supra, at 99. 2/

2/ An applicant who disagrees with the Forest Service may, of course, pursue that matter with that agency.

We have considered appellant's contentions and the Forest Service report to ascertain whether any further clarification or information should be sought from the Forest Service on the finding of the character of the tract sought by appellant.

As the Forest Allotment Act provides that allotments are to be made in conformity with the general allotment laws, the purpose and interpretations of those laws, so far as they are consistent with the Forest Allotment Act, are applicable. The agricultural value contemplated under section 4 of the General Allotment Act was related to "a homestead which would sustain an Indian family." Finch v. United States, 387 F.2d 13, 16 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968). The legislative purpose of that Act was to authorize allotments only upon lands which the Secretary determined could provide a home and furnish a livelihood by farming, raising livestock, or both. Hopkins v. United States, 414 F.2d 464, 468 (9th Cir. 1969). Appellant contends that the harvesting of natural food products, such as acorns and pine nuts, was not considered by the Forest Service as part of the agricultural value of the land. If not, we do not consider this to be an erroneous omission. The harvesting of such natural food products does not reflect the type of agricultural value contemplated by the Forest Allotment Act or General Allotment Act. This gathering activity is not the type of farming activity envisaged by Congress in enacting the allotment acts. No tillage of the land, cultivation, sowing, or harvesting of cultivated crops is entailed. Under the public land laws, including the Indian allotment laws, agricultural land value contemplates the amenability of land to be cultivated for crop production. See, e.g., 43 CFR 2400.0-5(d) defining "Agricultural" as referring "to the growing of cultivated crops."

It is evident that the Forest Service, in making its determination of the comparative value of the land, analyzed the percentage of timber cover, type of timber, and commercial value of the timber. Nothing that appellant has stated establishes that the land is not more valuable for its timber than for agricultural or grazing uses. His suggestion of use of the seed products from the trees tends to reflect the timber value more than an agricultural value. Furthermore, the fact that additional values, such as watershed and aesthetic values, were reported does not destroy the conclusion on the basis of the value of the timber. 3/ Appellant's contention regarding the possible "grazing" value

3/ In Curtis D. Peters, 6 IBLA 5, 7 (1972), the Board held: "The value of the timber need not necessarily be limited to its potential for lumber, but may encompass the amenities the timber adds to the land." Further, even if the Secretary of Agriculture reported the land to be more valuable for agricultural

of the tract cannot be accepted. In short, the basis of the Forest Service report is not unclear and the conclusion of the report based on the information therein is not erroneous so as to justify remanding the case to the Forest Service for further consideration. We conclude that rejection of the application was proper.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for the reasons herein stated.

Joan B. Thompson
Administrative Judge

I concur:

Martin Ritvo
Administrative Judge

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fn. 3 (continued)
or grazing purposes than for the timber, the Secretary of the Interior has discretion under the Forest Allotment Act whether to allot a particular tract of land. Value for watershed purposes, as well as recreational and aesthetic values, may properly be considered by BLM in exercising such discretion. Curtis D. Peters, 13 IBLA 4, 7-9, 80 I.D. 595 (1973); Everett E. Wilders, supra, at 340. Therefore, the reporting of such values by the Forest Service is helpful to BLM in that regard, and does not establish that the Forest Service applied any erroneous standards in making its own determination.

ADMINISTRATIVE JUDGE GOSS, CONCURRING SPECIALLY:

I agree in general with the majority opinion and the result herein. As to appellant's argument that the Forest Service used an incorrect standard, I agree with appellant's position that the value of a tree cannot be counted twice - first as cut timber and second as an enhancement of the value of the land. The record, however, does not show that the Forest Service did use such an incorrect standard. There is nothing in the record to indicate that the land is to be clearcut. Through careful management, the sale value of the timber can be realized and the enhanced value of the land can still be maintained. Assuming that the Forest Service has applied the proper standard, and that its decision is clear, this Department is bound by the Forest Service determination.

Joseph W. Goss
Administrative Judge